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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-491

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 15, 1978. A list of the petitioners is appended as Appendix A.

OPINIONS BELOW

The Order of the Court of Appeals (Appendix B hereto) has not been reported. That Order affirmed a Memorandum and Order (Appendix C hereto) entered by the District Court on September 12, 1978, which also has not been reported.

JURISDICTION

The Order of the Court of Appeals was entered on September 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) deprives the federal courts of jurisdiction to enjoin a union from striking and picketing railroads participating in a strike insurance program over their participation in that program and contributions to the payment thereunder of indemnities to another participant which is undergoing a strike or work stoppage by the union?

2. Whether strikes and picketing of railroads over their participation in a strike insurance program or their contributions to the payment thereunder of indemnities to another participant undergoing a strike or work stoppage by the union is contrary to the purposes and mandates of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*)?

3. Whether the Norris-LaGuardia Act should be accommodated to the Railway Labor Act so as to enable the federal courts to enforce the purposes and mandates of the Railway Labor Act by enjoining strikes and picketing in violation thereof?

STATUTES INVOLVED

Relevant provisions of the Norris-LaGuardia Act and the Railway Labor Act are set forth in Appendix D hereto.

STATEMENT OF THE CASE

Each of the 73 railroad petitioners is a party to service interruption or strike insurance policies under which

a participating railroad whose service is interrupted by a strike or "work stoppage" as defined in the policies[1] is paid daily indemnities intended to offset costs or losses incurred by the struck railroad as a result of the work stoppage.[2] The Norfolk & Western Railway Company (hereinafter "N&W") also is a party to those policies. The daily indemnities payable to a struck railroad are funded by additional premiums assessed against the non-struck participants in the program. The strike insurance program, as amended or supplemented from time to time, has existed since 1959, and its validity was upheld in *Kennedy* v. *Long Island Rail Road Company*, 319 F.2d 366 (2d Cir., 1963), *cert. den.*, 375 U.S. 830 (1963).

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[1] "The term 'Work Stoppage' shall mean a cessation of work by a part or all of the employees of the Insured for the purpose of enforcing demands made by one or more labor organizations on, or of resisting proposals of, Insured in instances (1) where such cessation of work grows out of a dispute or involves an issue that may then or thereafter affect Insured Railroads whose Daily Indemnities represent more than 50% of the aggregate of Insured Railroads' Daily Indemnities and (a) is contrary to the provisions of the Railway Labor Act or (b) is to enforce demands contrary to the recommendations of an Emergency Board appointed by the President of the United States, pursuant to the Railway Labor Act or (c) is in resistance to the application of recommendations of such an Emergency Board or (d) is in resistance to the promulgation of rules changes or the putting into effect of proposals which Insured Railroad had served under Section 6 of the Railway Labor Act, or any part of them, following failure by the labor union or unions involved to accept the recommendations of an Emergency Board appointed in connection with the dispute leading to such cessation of work, or (2) where the demands or proposals are directed to or may then or thereafter affect, or are made by, Insured Railroads representing more than 50% of the aggregate of the Insured Railroads' Daily Indemnities, and such an Emergency Board has not been appointed or, if appointed, such Board has failed to make definite findings or recommendations on the merits thereof."

[2] The daily indemnity under the basic policy is based upon certain fixed costs, such as property taxes and interest payments, that continue regardless of a work stoppage. The daily indemnity under the supplemental policy, subject to a maximum of 25% of daily gross operating revenues, is based on damages that are incurred after the end of a work stoppage, such as protracted reductions in traffic volume and deferred maintenance.

Since July 10, 1978, respondent has been striking the N&W in a dispute over certain scope rule and job protection issues.[3] None of the petitioners is a party to that dispute or a participant in the negotiations for settlement of the dispute. The N&W strike has been determined by the Advisory Committee, established under the strike insurance policies to determine such issues, to constitute a "work stoppage" as defined in those policies. The portion of the definition determined to be applicable is that defining a covered "work stoppage" as including one where "the demands or proposals are directed to or may then or thereafter affect, or are made by, Insured Railroads representing more than 50% of the aggregate of Insured Railroad's Daily Indemnities, and . . . an Emergency Board has not been appointed or, if appointed, such Board has failed to make definite findings or recommendations on the merits thereof." That aspect of the definition has not been changed since the program was adopted in 1959.

Events on August 23-25, 1978, including conversations with the International President of respondent, made it evident that respondent intended to strike some or all of the participants in the strike insurance program, commencing on or about August 28, 1978, over their participation in the strike insurance program and their contributions to the payment thereunder of indemnities to the N&W. Consequently, in the afternoon of August 25,

[3] The procedures of the Railway Labor Act have been exhausted in that dispute, as the National Mediation Board had terminated its services pursuant to 45 U.S.C. § 155 First and the President did not exercise his discretion, under 45 U.S.C. § 160, to appoint an emergency board. A motion by the N&W for a preliminary injunction against the strike on the ground that non-bargainable issues were involved, was denied on July 20, 1978 in *Norfolk & Western Railway Company* v. *Brotherhood of Railway, Airline and Steamship Clerks, Etc., et al.*, No. 78-C-2577 (N.D. Ill.). The denial is now before the Seventh Circuit on appeal by the N&W (No. 78-1936).

1978, the petitioners filed an action with the United States District Court for the District of Columbia alleging that the threatened strikes and picketing would violate the Railway Labor Act and the Interstate Commerce Act, and seeking injunctive and other relief. A motion for a temporary restraining order was heard that same day by Judge Aubrey Robinson, to whom the case was assigned. On August 27, 1978, Judge Robinson issued an order temporarily restraining respondent from striking or picketing any of the petitioner railroads solely over their participation in the strike insurance program. As subsequently extended by orders entered with the consent of respondent, that temporary restraining order was extended until such time as the Court decided petitioners' motion for a preliminary injunction.

The motion for preliminary injunction was heard before Judge Robinson on September 8, 1978. Respondent did not raise any contention or offer evidence in that proceeding to the effect that the strike insurance program is invalid or that the payment of indemnities thereunder to the N&W had caused or encouraged the N&W to refuse to bargain in good faith or otherwise fail to make every reasonable effort to settle its dispute with respondent. Moreover, Judge Robinson expressed during the proceeding (Tr., September 8, 1978, at 70-71) his conviction from the record that "if they [respondent] get the go-ahead, they are going to go ahead just as fast as they can" in striking and picketing petitioners.

Nonetheless, on September 12, 1978, Judge Robinson entered his Memorandum and Order (Appendix C hereto) denying the motion for a preliminary injunction, dissolving the temporary restraining order, and transferring the action to the Northern District of Illinois. The denial of a preliminary injunction was based exclusively upon his conclusion that the Court was deprived of jurisdiction to enter the requested injunctive relief by Sec-

tion 4 of the Norris-LaGuardia Act (29 U.S.C. § 104), as construed in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F.2d 649 (5th Cir.), *aff'd* by an equally divided Court, 385 U.S. 20 (1966). Applying an "economic self interest" test enunciated in that case (App. C, at 9a), Judge Robinson concluded (*id.*) that:

> "[t]he particular provisions of the strike insurance plan involved herein establish the necessary substantial alignment of Plaintiffs with N&W. And BRAC employees of Plaintiff companies share common interest with BRAC employees of N&W in the outcome of the N&W-BRAC controversy, just as Plaintiff companies share common interest with N&W in that same dispute.
>
> "For these reasons, this Court is deprived of jurisdiction to issue an injunction by the Norris-LaGuardia Act. Defendant's right to take economic action arises from the N&W dispute and not from a separate dispute with Plaintiffs. The Interstate Commerce Act and the Railway Labor Act do not affect this Court's determination. *Atlantic Coast Line*, *supra*, at 655."

The Memorandum and Order of September 12 was immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order "refusing . . . injunctions. . . ." On September 13, 1978, petitioners filed with the District Court a notice of appeal and a motion for stay of transfer and an injunction pending appeal. On the same day, after hearing argument by counsel for the respective parties, Judge Robinson entered an Order staying the transfer but denying an injunction pending appeal.

On September 14, 1978, petitioners filed with the Court of Appeals a motion for injunction pending appeal. Later that day, the Court of Appeals entered an Order staying "all proceedings in this controversy . . . until the further order of this Court, but for a period not to exceed 24

hours," to afford it an opportunity more fully to consider the matter. At 4:15 p.m. on September 15, 1978, the Court of Appeals (Judges Tamm and Wilkey), without hearing oral argument by counsel, entered its Order (Appendix B hereto) "that the order of the District Court on appeal herein denying preliminary injunction and transferring the case be, and the same hereby is, affirmed." The affirmance of the District Court's Order of September 12 was entered by the Court of Appeals *sua sponte*, as such action had not been requested by respondent and petitioners had simply moved for an injunction pending appeal.

On September 18, 1978, pursuant to a motion filed earlier that day by petitioners for an injunction pending petition to this Court for writ of certiorari, the Court of Appeals entered an order "that injunction is granted to allow appellants an opportunity to petition the United States Supreme Court for writ of certiorari," which "injunction shall expire at 4 p.m. on September 22, 1978." On September 19, 1978, petitioners applied to Chief Justice Burger, as Circuit Justice, for an injunction pending disposition by the Court of this petition for writ of certiorari and, if granted, pending decision by the Court on the merits. As of this writing, that Application has not yet been acted upon.

REASONS FOR GRANTING THE WRIT

1. The decision by the District Court, which the Court of Appeals summarily affirmed without further explanation, was based exclusively upon Section 4 of the Norris-LaGuardia Act as construed by the Fifth Circuit in its *Atlantic Coast Line* decision, which decision was affirmed by an equal division of this Court. See pp. 5-6, *supra*. In that decision, the Fifth Circuit acknowledged that "there does not appear to be direct Supreme Court authority" for its "economic self interest" test (362 F.2d, at 654),

there was a strong dissent to that decision (362 F.2d, at 655-660), and this Court obviously considered the matter to be worthy of review at that time. While this Court's even division after reviewing the merits of the *Atlantic Coast Line* case made a definitive decision impossible,[4] it emphasizes the importance of review by the Court of the decision below in this case.

2. The importance of review by the Court of the decision below is further emphasized by the fact that the strikes and picketing which would be permitted by that decision are much more extensive than the picketing involved in the *Atlantic Coast Line* case. Moreover, unless reversed by this Court, the decision below threatens the continued utility of the strike insurance program by allowing unions to convert any strike of a participating railroad into a strike of all of those railroads without interference by the federal courts.

The *Atlantic Coast Line* case involved picketing by employees of a struck railroad (the Florida East Coast) limited to a facility jointly owned by that railroad with three other railroads, which constituted a common situs for the interchange of traffic among those railroads and the struck railroad. Moreover, "despite the legal separateness of the Terminal Company's entity and operation, it cannot be disputed that the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC . . . ." 362 F.2d, at 651 (emphasis by the Court). The Fifth Circuit concluded that the Terminal Company had "aligned" itself with the FEC "by providing certain essential services and facilities to the . . . FEC." 362 F.2d, at 655. The case did not involve a strike insurance program.

[4] Of course, an affirmance by an evenly divided Court does not have precedential value. See, *e.g.*, *Neil* v. *Biggers*, 409 U.S. 188, 190-192 (1972).

In our case, on the other hand, the denial of the preliminary injunction will allow respondent to engage in full-scale strikes and picketing by their own employees of 73 railroads. And, the only basis for finding those railroads to be "aligned" with the N&W is their participation in the strike insurance program. The validity of that program as it then existed was upheld, over objections based upon the Railway Labor Act, the Interstate Commerce Act, and the Sherman Act, in *Kennedy* v. *Long Island Rail Road Company*, *supra*. And, the court below has adopted "the rationale of the *Kennedy* decision" in holding that a similar mutual aid program established by air carriers was "fully consistent with the national labor policy and the RLA." *Air Line Pilots Association International* v. *C.A.B.*, 502 F.2d 453, 456-457 (D.C. Cir. 1974), *cert. den.*, 420 U.S. 972 (1975).

Moreover, the "interest" of petitioners in the dispute between respondent and the N&W is precisely the concern which, as the Second Circuit explained in the *Kennedy* case, was the reason for the adoption of the strike insurance program:[5]

> ". . . In essence, the strike insurance plan represented the reaction of the nation's leading railroads to the combined effects of economic distress and selective strike tactics (known as 'whipsawing') by the unions . . . . One of the reasons assigned for the union's success in securing such increases on a nationwide scale in the past decade is its use of the 'whipsaw' strike, in which the strike effort is directed to a single railroad; concessions extracted by

[5] For example, Charles I. Hopkins, Jr., Chairman of the National Railway Labor Conference, testified that "what happens on one railroad on a subject of common and mutual interest, impacts all of the other railroads" in that there "is a phenomenon, or for us, the reality, of whipsawing, sometimes known as leapfrogging, whereby whatever supposed advance may be won by an organization on one railroad is pressed either serially or otherwise on each of the other railroads." Deposition, August 30, 1978, at 30-31.

> the union in a single case, it is suggested, soon become predominant throughout the country, because of the highly interdependent wage structure of the railroad industry. The harsh economic impact upon the striking employees is cushioned by strike benefits which emanate from a fund to which all railroads are required by law to contribute.
>
> "The railroads sought to ameliorate their plight by subscribing to an insurance program which, by supplying a limited amount of funds to roads hit by a certain limited class of strikes, was expected to strengthen their bargaining position and render less economically drastic the effects of a work stoppage." 319 F.2d, at 368-369.[6]

In short, the interest of the participants in the strike insurance program, in supporting a struck railroad in a strike that constitutes a "work stoppage" under that program, is one which the *Kennedy* case fully recognized in holding that the program "was an instrument of self-help properly employed in the process of collective bargaining." 319 F.2d, at 371. It is an interest which, as the court below stated in *Air Line Pilots Association International* v. *C.A.B.*, *supra*, at 457, is "fully consistent with the national labor policy and the RLA [Railway Labor Act]." There is no evidence in the record of this case that the payment of indemnities to the N&W under the strike insurance program has caused the N&W to refuse to bargain in good faith with respondent, or otherwise refuse to exercise every reasonable effort to settle its dispute with respondent, or that any petitioner has urged

[6] The statement in that opinion that the "harsh economic impact upon the striking employees is cushioned by strike benefits which emanate from a fund to which all railroads are required by law to contribute" refers to the payment of unemployment benefits to striking railroad employees under the Railroad Unemployment Insurance Act. 45 U.S.C. §§ 351 *et seq.* Those benefits now come to $25 per day, 45 U.S.C. § 352(a), and are paid out of a fund established through contributions assessed against the railroads, 45 U.S.C. § 358.

such a course upon the N&W. And, under Article VII of the strike insurance policies, an "Insured shall be free at any time, without prejudice to this insurance, to make with the labor organization or organizations concerned an agreement that results in termination of such work stoppage."

In short, the decision below allows petitioners to be struck and picketed by reason of their participation in a valid strike insurance program, apparently for as long as respondent's dispute with the N&W continues, even though they are contractually bound as parties to the service interruption policies to pay whatever additional premiums are called for thereunder to fund the payment of indemnities to the N&W, and even though they are not parties to respondent's dispute with the N&W and thus have no voice in its settlement. And, if the decision below is allowed to stand, it would constitute precedent supporting a similar spreading of future strikes of one railroad to some or all of the participants in the strike insurance program. In effect, a union could utilize a dispute with one railroad to call a national railroad strike. Petitioners' only alternative would be to permit the program to lapse, and thus once again to leave themselves virtually helpless to resist the whipsawing tactics that gave rise to the strike insurance program. We submit that a decision having such consequences is not supported by the *Atlantic Coast Line* case or any other decision, and surely is both sufficiently questionable and sufficiently important to justify review by this Court.

3. Finally, and perhaps most importantly, there is a more basic reason why the decision below is erroneous and should be reviewed by this Court. That decision is "fundamentally at odds with the [Railway Labor] Act's primary objective—the prevention of strikes," *Shore Line* v. *Transportation Union*, 396 U.S. 142, 154 (1969), and with decisions of this Court holding that Norris-LaGuardia must be accommodated to the Railway Labor Act so

as to enable the federal courts to effectuate that purpose and permit the federal courts to enjoin strikes and picketing of railroads which are not consistent with the Railway Labor Act.

Thus, the first of the Act's "general purposes," set forth in Section 2 (45 U.S.C. § 151a), is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." And, Section 2 First (45 U.S.C. § 152 First), described by this Court as the "heart of the Railway Labor Act," [7] imposes upon both the railroads and their employees "the duty . . . to exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." In short, the Act was intended to provide "a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' H.R. Rep. No. 328, 69th Cong., 1st Sess., p. 1." *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

This Court has recognized in a number of circumstances that "an injunction does not fall within the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, because of the superseding purposes of the Railway Labor Act. . . ." *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 531 (1960).[8] The leading decision

[7] *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969).

[8] See, *e.g.*, *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 581-584 (1971); *Locomotive Engineers* v. *L. & N.R. Co.*, 373 U.S. 33, 39 (1963); *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 562-563 (1937).

in this regard is *Trainmen* v. *Chicago, R. & I.R. Co.*, 353 U.S. 30 (1957). This Court there held that there "must be an accommodation" of Norris-LaGuardia to the Railway Labor Act, so as to authorize the federal courts to enjoin a strike or other self help which is contrary to the mandates of the Railway Labor Act. 353 U.S., at 40. In so doing, the Court relied in part upon legislative history of Norris-LaGuardia which "recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them." 353 U.S., at 41. See, also, the dissent in the *Atlantic Coast Line case*, 362 F.2d, at 659 n. 7. Hence, we submit that the Fifth Circuit in *Atlantic Coast Line* clearly erred in rejecting out of hand a contention that Norris-LaGuardia should be "accommodated" to the Railway Labor Act (362 F.2d, at 655), and that the court below similarly erred in summarily affirming the equally summary conclusion by the District Court that "the Railway Labor Act [does] not affect this Court's determination," citing *Atlantic Coast Line*. *See* p. 6, *supra*.[9]

This is particularly so since the courts below did not deny that strikes and picketing of petitioners by reason of their participation in the strike insurance program and their contributions to the payment of indemnities there-

[9] That decision also conflicts with the decision in *Chicago & Illinois Midland Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771 (7th Cir.), vacated as moot, 375 U.S. 18 (1963). The railroad in that case was picketed by striking employees of a barge line, and the railroad's employees refused to cross the picket line "as a matter of union principle." 315 F.2d at 774. In affirming the issuance of a preliminary injunction against unions representing the railroad's employees, requiring such employees to report to work, the Seventh Circuit properly recognized the "need to accommodate Norris-LaGuardia to the Railway Labor Act" even where "secondary" pressures are involved. 315 F.2d at 775.

under to the N&W is contrary to the purposes and mandates of the Railway Labor Act, and they could not properly have done so. In general, there are two kinds of disputes that properly can arise under the Act: "minor" disputes over the interpretation or application of existing agreements between a carrier and union, and "major" disputes over proposals to change such agreements concerning the rates of pay, rules or working conditions of the employees. See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945).

Minor disputes not settled by the parties are subject to compulsory arbitration under Section 3 of the Act (45 U.S.C. § 153), and a union cannot lawfully strike over such a dispute either before or after such arbitration. *Locomotive Engineers* v. *L. & N. R. Co.*, *supra*; *Trainmen* v. *Chicago, R. & I.R. Co.*, *supra*. In major disputes, agreement is not imposed upon the parties, but before they may resort to self help they must exhaust procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).[10] Unless and until those procedures have

[10] Those procedures are succinctly described in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, at 378, as follows:

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

been exhausted, the parties must preserve the *status quo* and a strike or other resort to self help is unlawful. *Shore Line* v. *Transportation Union*, *supra*, at 148-153; *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, at 378-380.

Respondent has not served petitioners with notice of proposals to terminate or alter their participation in the strike insurance program and, of course, has not exhausted the procedures of the Act in regard to such a proposal. Moreover, it seems clear that petitioners' participation in the strike insurance program is not "directly related to 'rates of pay, rules, and working conditions' " so as to constitute a mandatorily bargainable issue under the Railway Labor Act. *Japan Air Lines* v. *Intern. Ass'n of Machinists*, 538 F.2d 46, 52 (2d Cir. 1976). Counsel for respondent so conceded in the District Court. Tr., August 29, 1978, at 10. And, a strike or other resort to self help over an issue that is not mandatorily bargainable is "illegal as in violation of the Railway Labor Act and subject to injunction." *Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive F. & E.*, 253 F. Supp. 682, 688 (D. D.C., 1966), *aff'd* in relevant part *sub nom.*, *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, 385 F.2d 581, 603-604 (D.C. Cir., 1967), *cert. den.*, 390 U.S. 923 (1968). See also, *e.g.*, *Illinois Central R. Co.* v. *Locomotive Engineers*, 443 F.2d 136, 144 (7th Cir., 1971); *Seaboard World Airlines, Inc.* v. *Transport Workers*, 443 F.2d 437 (2d Cir., 1971); *Chicago & North Western Ry. Co.* v. *Order of Rail Tel.*, 264 F.2d 254 (7th Cir., 1959), *rev'd* on other grounds, 362 U.S. 330 (1960); *Brotherhood of Rail. Train.* v.

New York Central R. Co., 264 F.2d 114 (6th Cir.), *cert. den.*, 355 U.S. 877 (1957).

This issue is of vital importance going beyond the confines of this case, since it is the "accommodation" of the two Acts, and the resulting inapplicability of Section 4 of Norris-LaGuardia to railroad strikes and picketing not permitted by the Railway Labor Act, that permits the federal courts to effectuate the basic purpose of that Act to prevent strikes in many of the disputes among railroads (and also airlines) and their employees subject to the Railway Labor Act. We submit that it clearly is an issue deserving review by this Court.

Respondent urged below that this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra*, establishes that the Railway Labor Act does not prohibit "economic action" against railroads that are not parties to a dispute. However, that 4-3 decision simply upheld secondary picketing by employees of a struck railroad confined to a joint terminal or "common situs" which that railroad owned in common with three other railroads, and as to which "the facilities and services provided by the Terminal Company *in fact* constituted an integral part of the day-to-day operations" of the struck railroad. 394 U.S., at 373 (emphasis in the original); see, generally, *id.*, at 372-376.[11]

In short, *Jacksonville Terminal* involved the "problem of delineating the scope of permissible picketing at a 'common situs'—a place, such as respondent's terminal, where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities. . . ." 394 U.S., at 388-389. It did not uphold all secondary

[11] The picketing involved in the *Jacksonville Terminal* was the identical picketing that was involved in the Fifth Circuit's *Atlantic Coast Line* decision, but *Jacksonville Terminal* involved review of an injunction entered by a State court and the Norris-LaGuardia Act was not directly involved.

picketing in connection with a primary strike under the Railway Labor Act. Judge Robinson made clear his view, early in the proceedings below, that *Jacksonville Terminal* could not properly be extended beyond its facts so as to support respondent's threatened strikes and picketing of the participants in the strike insurance program,[12] and there is no indication that either his decision or the summary affirmance by the Court of Appeals was based upon a contrary view of *Jacksonville Terminal.* Whatever may be the extent of secondary picketing permissible under *Jacksonville Terminal*, the decisions by the courts below are based upon Section 4 of the Norris-LaGuardia Act and would permit an all-out strike of petitioners by their own employees represented by respondent over the participation by petitioners in the strike insurance program. Any contention that such strikes are permissible under the Railway Labor Act, under the *Jacksonville Terminal* decision or otherwise, in itself would constitute a very important issue which has not been decided by this Court and thus would reinforce the importance of reviewing the decision by the Court of Appeals.

[12] Tr., August 29, 1978, at pp. 18-19.

CONCLUSION

To summarize, the decision below involves issues that are of large importance not only in the instant case, but also generally with regard to the relationship between the Norris-LaGuardia and the Railway Labor Acts. This case not only presents in more egregious circumstances issues which this Court previously considered but failed to resolve, by reason of its even division in the *Atlantic Coast Line* case, but also implicates the future of petitioners' strike insurance program and the ability of the federal courts to enforce the purposes and mandates of the Railway Labor Act. For these reasons, as set forth more fully above, the petition of writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

LIST OF PETITIONERS

Alton & Southern Railway Company
Alabama Great Southern Railroad Company
Atchison, Topeka & Santa Fe Railway Company
Atlanta & West Point Railroad Company
The Balitimore & Ohio Railroad Company
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad
Burlington Northern
Norfolk Southern Railway Company
Central California Traction Company
Central of Georgia Railroad Company
The Chesapeake & Ohio Railway Company
Chicago & Illinois Western Railroad
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago South Shore & South Bend Railroad
Cincinnati, New Orleans & Texas Pacific Railway Company
Clinchfield Railroad Company
Colorado & Southern
Davenport, Rock Island and North Western Railway Company
Delaware & Hudson Railway Company
The Denver & Rio Grande Western Railroad Company
Des Moines Union Railway Company
Duluth, Missabe & Iron Range Railway Company
Elgin, Joliet & Eastern Railway Company
Fort Worth & Denver Railway Company
Georgia Railroad
Georgia Southern & Florida Railway Company
Green Bay & Western Railroad Company
Illinois Central Gulf Railroad Company

Illinois Terminal Railroad Company
Interstate Railroad Company
The Kansas City Southern Railway Company
Kentucky & Indiana Terminal Railroad Company
Lake Superior & Ishpeming Railroad Company
Louisville & Nashville Railroad Company
Maine Central Railroad Company
Minneapolis, Northfield & Southern Railway
Minnesota Transfer Railway Company
Missouri Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Monongahela Railway Company
Montour Railroad Company
New Orleans Terminal Company
Norfolk & Portsmouth Belt Line Railroad Company
Northwestern Pacific Railroad Company
Peoria & Pekin Union Railway Company
Petaluma & Santa Rosa Railroad Company
Pittsburgh & Lake Erie Railroad Company
Pittsburgh, Chartiers & Youghiogheny
Railway Company
Portland Terminal Company
Quanah, Acme & Pacific Railway Company
Richmond, Fredericksburg & Potomac
Railroad Company
Sacramento Northern Railway
St. Johns River Terminal Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
San Diego & Arizona Eastern Railway Company
Seaboard Coast Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Tennessee, Alabama & Georgia Railway Company
Texas Pacific-Missouri Pacific Terminal Railroad
of New Orleans

Tidewater Southern Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Waterloo Railroad Company
Western Maryland Railway Company
Western Pacific Railroad Company
Western Railway of Alabama
Winston Salem Southbound Railway Company
Youngstown & Southern Railroad Company

APPENDIX B

UNITED STATES COURT 0F APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

No. 78-1900

Civil Action No. 78-1607

[Filed Sep. 15, 1978]

ALTON & SOUTHERN RAILWAY COMPANY, et al.,
Appellants

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Appellees

BEFORE: Tamm and Wilkey; Circuit Judges

ORDER

On consideration of appellants' motion for injunction pending appeal, of the responses filed with respect thereto, and of the record on appeal herein, it is

ORDERED by the Court that the order of the District Court on appeal herein denying preliminary injunction and transferring the case be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the District Court forthwith.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 78-1607

Sep. 12, 1978

ALTON & SOUTHERN RAILWAY COMPANY, et al.,
Plaintiffs

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Defendant

MEMORANDUM AND ORDER

Plaintiffs have moved this Court to enter a Preliminary Injunction restraining Defendant, its lodges, divisions locals, officers, agents, employees, members, and all persons acting in concert with them, from authorizing, calling, continuing, encouraging, permitting or engaging in any strikes or work stoppages against, and from picketing the premises of, any of the Plaintiffs over their participation in the Service Interruption Policies. For the reasons discussed below, this Court concludes that it is without jurisdiction, under Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, to grant the relief requested by Plaintiffs. Accordingly, this Court shall deny Plaintiffs' Motion for Preliminary Injunction, dissolve the outstanding Temporary Restraining Order, and transfer this action to the United States District Court for the Northern District of Illinois.

Defendant is currently engaged in a labor dispute with Plaintiff-Intervenor Norfolk & Western Railway Com-

pany ("N&W"), involving proposed changes in the scope of the parties' bargaining agreement under the Railway Labor Act, 45 U.S.C. §§ 151, et seq. ("RLA").[1] On July 20, 1978, Judge Kirkland denied N&W's Motion for a Temporary Retraining Order and Motion for a Preliminary Injunction, thereby relegating the parties to self-help in attempting to resolve their differences. Defendant BRAC has engaged in a strike against N&W since July 10, 1978.

N&W participates in a strike insurance program with Plaintiff companies. The purpose of the strike insurance program is to enable the railroads to resist whipsaw strike tactics. Each participant in the program contributes a sum equal to its predetermined daily indemnity, plus an annual premium and additional premiums as provided in the policy.

If any insured railroad sustains a work stoppage as defined in the policy, it receives its predetermined daily indemnity for each day of the work stoppage (except for the first day). Basic policy benefits cover items of fixed expense, including the "cost of Supervisory, Official and other forces necessary in its [the insured's] opinion to preserve [the carrier's] properties in a standby condition suitable for resumption of services at the end of a suspension of operations." Supplemental policy coverage includes a percentage of average daily gross operating revenue. Supplemental policy coverage may become effective if a carrier's operations during the work stoppage are 50% or less of normal operations, and basic policy coverage may become effective if the carrier's contract employees are not performing their duties.

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[1] See Norfolk and Western Railway Company v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al., No. 78-C-2577 (N.D. Ill., July 20, 1978).

Basic and supplemental coverage under the Service Interruption Policies do not extend to a struck railroad unless the cessation of work "grows out of a dispute or involves an issue that may then or thereafter affect Insured Railroads whose Daily Indemnities represent more than 50%" of the total daily indemnities. The Advisory Committee under the Strike Interruption Policies and the National Railway Labor Conference determined that the BRAC strike of N&W constituted a work stoppage under the strike insurance program because the subject matter of the dispute was of common interest to all the other railroads and could substantially affect their vital interests. N&W has been receiving $520,616.00 and $279,384.00 as its daily indemnities under the basic and supplemental policies, respectively.

This is a case involving or growing out of a labor dispute.[2] Accordingly, this Court is without jurisdiction

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[2] Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any

to preliminarily enjoin "any person or persons participating or interested in such dispute . . . from . . . refusing to perform any work . . . [or] giving publicity to the existence of, or the facts involved in, any labor dispute. . ." [3]

This case presents a situation not unlike that confronted by the Court in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R. Co.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). That case arose out of a labor controversy between the Brotherhood and the Florida East Coast Railroad ("FEC"). The Brotherhood sought to picket the Jacksonville Terminal Company, which was contributing various services to the FEC. The purpose of the picketing was to cause the Terminal Company to cease providing services to the FEC. The Court characterized the

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association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

[3] Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

> No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . .
>
> (a) ceasing or refusing to perform any work or to remain in any relation of employment . . .
>
> (c) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence . . .
>
> [or]
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

Brotherhood's activity as "an attempt, through peaceful picketing, to elicit a secondary boycott of the FEC by the appellee-companies, which depended for its success upon the aid of appellees' employees in refusing to cross appellants' picket lines . . . ." *Atlantic Coast Line*, *supra*, at 651.

Defendant BRAC's intended picketing of Plaintiffs due to their participation in the strike insurance program qualifies under the "economic self-interest test" set out in the *Atlantic Coast Line* case, *supra*, and is therefore within the intended scope of Norris-LaGuardia protection. The economic self-interest test is satisfied when

> a labor group attempts to bring secondary pressure upon the employer with whom its primary dispute exists by means of exerting primary pressure upon a secondary employer, who has aligned himself with the primary employer in some substantial manner. . . .

The particular provisions of the strike insurance plan involved herein established the necessary substantial alignment of Plaintiffs with N&W. And BRAC employees of Plaintiff companies share common interest with BRAC employees of N&W in the outcome of the N&W—BRAC controversy, just as Plaintiff companies share common interest with N&W in that same dispute.

For these reasons, this Court is deprived of jurisdiction to issue an injunction by the Norris-LaGuardia Act. Defendant's right to take economic action arises from the N&W dispute and not from a separate dispute with Plaintiffs. The Interstate Commerce Act and the Railway Labor Act do not affect this Court's determination. *Atlantic Coast Line*, *supra*, at 655.

This Court further finds that this action should be transferred to the United States District Court for the Northern District of Illinois, pursuant to 28 U.S.C. § 1404(a). The issues in this case in its present posture

are integrally related to issues currently being litigated in that Court.[4] The instant suit could have been brought in the Northern District of Illinois, 28 U.S.C. § 1391. Therefore, the "interests of justice" require the transfer of this action.

For the reasons stated above, it is by the Court this 12th day of September, 1978,

ORDERED, that Plaintiffs' Motion for Preliminary Injunction is hereby DENIED; and it is

FURTHER ORDERED, that the Temporary Restraining Order is hereby dissolved; and it is

FURTHER ORDERED, that this action is hereby transferred to the United States District Court for the Northern District of Illinois.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

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[4] See Norfolk and Western Railway Company v. BRAC, supra n.1; BRAC v. Association of American Railroads, et al., No. 78-C-3423 (N.D. Ill., August 30, 1978).

As this action was initially presented to this Court, it appeared that the sole issue to be determined was whether the strike insurance plan constituted a per se violation of the Railway Labor Act. See Kennedy v. Long Island R.R. Co., 319 F.2d 366 (2d Cir. 1963). That issue is distinct from any considerations before the Court in the Northern District of Illinois. However, as is reflected in this Memorandum and Order, Defendant's position has changed, and transfer is now required.

APPENDIX D

STATUTES INVOLVED

Norris-LaGuardia Act, 47 Stat. 70:

Section 4, 29 U.S.C. § 104:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless or any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13, 29 U.S.C. § 113:

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Railway Labor Act, 44 Stat. 577, as amended:

Section 2, 45 U.S.C. § 151a:

SECTION 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2 First, 45 U.S.C. § 152 First:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Second, 45 U.S.C. § 152 Second:

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 5 First, 45 U.S.C. § 155 First:

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted

in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Section 6, 45 U.S.C. § 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days

after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.